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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

RSA No. 4877 of 2014 (O&M)

Date of Decision: October 30, 2019

Dalel Singh

..... Appellant(s)

Versus

Himmat Singh and others

..... Respondent(s)

CORAM:- HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. N.D. Achint, Advocate
for the appellant.

Respondent no.1 – Himmat Singh in person.

None for respondents no.2 to 5, despite service.

LISA GILL, J.

Appellant-defendant has filed this appeal being aggrieved of judgment and decree dated 16.07.2014, passed by the learned District Judge, Gurgaon as well as judgment and decree dated 29.11.2013, passed by the learned Civil Judge (Jr. Division), Gurgaon.

Brief facts necessary for the adjudication of the case are that the plaintiff (arrayed as respondent no.1 in this appeal) filed a suit for partition in respect to the property described in the plaint as well as a decree for mandatory injunction for restraining the present appellant from raising any other construction over the property in question, as well as for mandatory injunction for removing the submersible pump, septic tank and encroachment over the portion as marked in the site plan attached. Plaintiff claimed that his father

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namely Ran Singh and defendant-appellant Dalel Singh were real brothers being the sons of Bharat Singh. It is pleaded that Ran Singh and Dalel Singh purchased the property in question in the year 1977 vide two sale deeds bearing Vasika No. 775 dated 08.06.1977 and Vasika No. 1637 dated 08.08.1977 measuring 10 Biswas. Remaining 2 Biswas of land were purchased by Ran Singh and Dalel Singh from Smt Parkash Kaur for consideration before the death of Ran Singh, who passed away on 10.03.1978. Documents relating to the transactions of the 2 Biswas of land are pleaded to be in possession of the defendant-appellant.

It is claimed that the plaintiff and the proforma defendants (arrayed as respondents no.2 to 5 in this appeal) are owners in possession of the property to the extent of half share and the appellant was stated to be the owner in possession of the rest of the half share. Ran Singh who passed away on 10.03.1978 was survived by three sons i.e. the plaintiff Himmat Singh, Aman Singh who is survived by two sons (respondents no.3 & 4 in this appeal) and his wife Ram Kaur (respondent no.4 in this appeal) and another son Bahadur Singh, who died issueless and unmarried on 07.03.2002. An oral partition is stated to have been effected between Ran Singh and Dalel Singh after purchase of the land. Site plan was attached. It is further pleaded that after the death of Aman Singh, his sons and widow are in occupation of the property. After the death of Bahadur Singh on 07.03.2002, the plaintiff claimed to have gone to Haridwar for performing his last rites and the defendant-appellant is alleged to have installed a submersible pump and a septic tank adjacent to the plaintiff's house over a joint passage in a forcible and illegal manner. Appellant is also alleged to have raised construction of a latrine near the septic tank and in the

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plaintiff's absence defendant no.1 also demolished a tin shed raised by the plaintiff for collection of fodder, which is duly reflected in the site plan. Defendant no.1 is stated to have encroached over the said area. The septic tank is pleaded to be a cause of nuisance in the kitchen and other portion of the house of the plaintiff due to foul smell and poisonous gas discharged through the waste pipe of the septic tank. Living in the plaintiff's house was stated to have become miserable and in fact dangerous. Appellant-defendant it is pleaded was not residing in the area where he had raised construction and over the encroached portion of the plaintiff, about 70 rooms/hutments were erected for earning rent. Approximately 300-400 tenants are stated to be residing in the said rooms and using the septic tank. Due to these reasons the suit was filed.

Defendant no.1 contested the suit raising various preliminary objections. It is stated that in respect to the property purchased by Ran Singh and Dalel Singh measuring 10 Biswas, an oral partition already stood effected between them. The parties are claimed to be in possession of the respective shares, which fell to them. Site plan attached with the plaint is denied to be correct. The passage in question is claimed to be owned and possessed exclusively by the defendant-appellant. Construction over the area in the site plan which was attached by defendant no.1 is claimed to have been raised between 1978 to 1992. Dismissal of the suit was prayed for.

Defendants no.2 to 5 filed a separate written statement admitting the claim of the plaintiff.

Replication to the written statement was filed by the plaintiff. Following issues were framed by the learned trial Court on the basis of the pleadings:-

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1. Whether the plaintiff is owner in possession of the 1/2 share of total land measuring 12 Biswas as alleged in the plaint? ? OPP.
2. Whether there has been an oral partition as alleged in Para No.3 of the plaint, if so what effect ? OPP
3. Whether the partition shown in red colour in the attached site plan as a passage was for common use by the parties as alleged in para no.3 of the plaint ? OPP.
4. Whether plaintiff has no locus standi to file the present suit? OPD
5. Whether the suit is not property valued for the court fee and jurisdiction? OPD
6. Relief.

Evidence was led by both the parties in support of their respective claims/stands.

Learned trial Court at the first instance dismissed the suit filed by the plaintiff on 25.01.2011. However, the learned Appellate Court, on an appeal filed by the plaintiff, set aside the judgment dated 25.01.2011 and remanded the matter to the learned Trial Court for a decision afresh, vide judgment dated 26.07.2012. Learned trial Court on remand of the matter decided the matter afresh vide the impugned judgment and decree dated 29.11.2013. While partly decreeing the plaintiff's suit, a preliminary decree was passed to the effect that the plaintiff along with the proforma defendants no.2 to 5 are entitled to half share in the land bearing Khasra No.523, measuring 10 Biswas in the revenue estate of village Khandsa and its possession thereto. Defendant no.1 was held entitled to rest of the half share.

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It is observed by the learned trial Court that the plaintiff failed to prove that 2 Biswas of land claimed to have been purchased later were in fact purchased by Ran Singh and Dalel Singh together. The decree was passed in respect to 10 Biswas of land only. Defendant-appellant was also restrained from raising construction thereon till the delivery of actual possession of half share to the plaintiff and proforma defendants.

Appeal preferred by the appellant-defendant no.1 was dismissed by the learned District Judge, Gurgaon vide judgment dated 16.07.2014. Aggrieved therefrom, present appeal has been filed by the appellant-defendant.

It is relevant to note at this stage that no appeal was filed by the respondent-plaintiff in respect to the said 2 Biswas of land either at the first instance and neither any cross-objections have been filed in this appeal.

Learned counsel for the appellant-defendant argues that both the learned Courts below have wrongly decreed the suit filed by the plaintiff to the extent of 10 Biswas of land. The plaintiff it is contended has miserably failed to prove his case. Partition between the parties already stood effected during the life time of Ran Singh himself. It is further contended that all the co-sharers have not been impleaded as a party to the suit. Therefore, the present suit should be dismissed on this ground itself. It is submitted that the 2 Biswas of land are reflected in the name of Mishro Devi wife of Dalel Singh and passing of the preliminary decree in respect to 10 Biswas of land amounts to partial partition, which is impermissible. The matter was in fact remanded to the learned trial Court on 26.07.2012 in order to decide the matter regarding

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the 2 Biswas of land. However, learned trial Court has not decided the matter effectively, which has led to irreparable and palpable injustice to the defendant-appellant. Learned counsel for the appellant seeks to raise the following substantial questions of law for consideration:-

- i. Whether the impugned judgments and decrees rendered by learned Courts below are against law and facts and are liable to be reversed as there is misreading of evidence on record leading to a perversity therein?
- ii. Whether the present is a case of partial partition?
- iii. Whether the co-owner namely Mishro Devi was not arrayed and no partition can be effected without joining all the co-owners?

It is, thus, prayed that this appeal be allowed. Both the impugned judgments and decrees be set aside. Consequently, suit filed by the plaintiff-respondent be dismissed.

Respondent no.1-plaintiff has appeared in person and has argued his case at length. With reference to the record, which was requisitioned, respondent no.1 argued that both the learned Courts below have rendered well reasoned and logical judgments on the basis of evidence on record. He argues that the appellant has tried to mis-lead the Court while submitting at the time of issuance of notice of motion that the suit filed by him is bad for non-impleadment of Mishro Devi. It is submitted that Mishro Devi is none other but the wife of the appellant-defendant Dalel Singh. The argument that Mishro Devi is a necessary party, should be rejected. It is also pointed out that defendant-appellant himself along with the plaintiff and the other proforma

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respondents had filed CWP No. 1333 of 1990 before this Court challenging the acquisition of a part of the land by the State Government in the year 1990, especially on the ground of existence of residence of the parties. It is submitted that Mishro Devi was not a party in the said writ petition, which was decided by this Court on 31.08.1992 and ultimately the land in question was released from acquisition by the State Government. Furthermore, sale deed dated 22.09.2009 executed by Megh Singh to whom Smt. Parkash Kaur is alleged to have delivered possession of 2 Biswas of land has been found to be a forged and fraudulent document by the Court of competent jurisdiction. It is denied that the property in question has been divided by metes and bounds. The appellant-defendant is contended to be in possession of much more of the property than to which he is entitled. It is, thus, prayed that this appeal be dismissed and the judgments and decrees of both the Courts below be upheld.

I have heard learned counsel for the appellant and respondent no.1 in person and have gone through the record, which was requisitioned.

It is not denied by learned counsel for the appellant that 10 Biswas of land was indeed purchased by Ran Singh, father of the plaintiff and predecessor in interest of the proforma defendants No.2 to 5 along with Dalel Singh in the year 1977 vide registered sale deeds as mentioned in the aforementioned paras. In respect to the 2 Biswas of land, the plaintiff, it has been held, failed to bring any document on record by which title may have vested with both Ran Singh and Dalel Singh. It is a matter of record that CWP No. 1333 of 1990 was filed by the present appellant alongwith the plaintiff and the proforma respondents for release of the suit land (12 Biswas), which

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was acquired. It was claimed that they all were the joint owners in possession of the property in question. Smt. Mishro Devi is not arrayed as a party in the said writ petition. Be that as it may, the question of the said 2 Biswas of land is not required to be gone into as the plaintiff has not preferred to challenge the finding of both the learned Courts below in this respect.

At the same time, the argument raised by learned counsel for the appellant to the effect that Mishro Devi is a necessary party and the suit should be dismissed on this ground itself, is not borne out from the record. At the first instance, a perusal of the written statement filed by the defendant-appellant reveals that no such pleading is forthcoming. I have perused the written statement on behalf of the appellant thoroughly. It is categorically stated in the written statement that the land measuring 2 Biswas was in fact purchased in the year 1981 through an oral sale by the appellant Dalel Singh himself. It is denied that the said 2 Biswas was purchased jointly by Dalel Singh and Ran Singh. There is not even a whisper about Smt. Mishro Devi being the owner of the suit property. It is in fact stated that Dalel Singh had purchased this property from Smt. Parkash Kaur daughter of Kartar Singh. It is not understandable how the appellant is entitled to take a stand that Smt. Parkash Kaur delivered the possession to one Megh Singh and thereafter on 22.09.2009 Megh Singh executed a sale deed in favour of Smt. Mishro Devi, who is none other but the wife of the appellant Dalel Singh. Criminal proceedings initiated by the plaintiff in respect to the fraudulent nature of the sale deed are not denied by learned counsel for the appellant. Respondent no.1 has admittedly not challenged the findings of both the learned Courts below to the effect that he was unable to prove the purchase of 2 Biswas of land jointly

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by Ran Singh and Dalel Singh. The question remains alive only in so far as the 10 Biswas of land which was purchased in 1997 by Ran Singh and Dalel Singh. Challenge not being raised to the finding regarding the 2 Biswas of land cannot be of any benefit to the appellant. The argument raised in respect to the non-joinder of the necessary parties with a consequent prayer for dismissal of the suit is clearly unsubstantiated and untenable. Hence, same is rejected.

As far as the 10 Biswas of land purchased in 1977 by Ran Singh and Dalel Singh is concerned, there is indeed no dispute. The evidence on record clearly shows that the property in question has not been transferred by meets and bounds. Filing of CWP in the year 1990 itself reflects that the partition between the parties had not been carried out. Ran Singh had admittedly died on 10.03.1978. The said property being held jointly is duly proved on record. Learned counsel for the appellant is indeed unable to point out any evidence on record, which proves that the said 10 biswas of land stood partitioned.

Both the learned courts below have rendered concurrent findings of fact against the appellant on a wholesome and proper appreciation of evidence on record which warrants no interference. There is no illegality, infirmity or perversity in the impugned judgment and decree dated 16.07.2014, passed by the learned District Judge, Gurgaon as well as judgment and decree dated 29.11.2013, passed by the learned Civil Judge (Jr. Division), Gurgaon, which calls for any interference by this Court in second appeal. The questions of law are thus answered against the appellant and in favour of the plaintiff/respondent.

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No other argument has been raised.

Judgment and decree dated 16.07.2014, passed by the learned District Judge, Gurgaon as well as judgment and decree dated 29.11.2013, passed by the learned Civil Judge (Jr. Division), Gurgaon are upheld.

Appeal is accordingly dismissed with no order as to costs.

October 30, 2019.

Sunil

(LISA GILL)
JUDGE

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No